Filed 1/30/19 In re K.E. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re K.E., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B285373 (Super. Ct. No. YJ39229) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. K.E., Defendant and Appellant.	ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 3, 2019, be modified as follows:

1. On page 2, the first sentence in the third paragraph beginning "E.H. left McDonald's and walked …" is deleted and the following sentences are inserted in its place:

> E.H left McDonald's. An hour later he walked down the street to "take the bus."

2. On page 8, lines 5-6, in the last paragraph, the sentence "When he left the restaurant, the group followed him" is deleted and the following sentence is inserted in its place:

> An hour after he left the restaurant, the group went in his direction and approached him.

Appellant's petition for rehearing is denied.
There is no change in the judgment.

Filed 1/3/19 In re K.E. CA2/6 (unmodified opinion)

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In re K.E., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B285373 (Super. Ct. No. YJ39229) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. K.E., Defendant and Appellant.	

K.E. appeals an order of the juvenile court sustaining a Welfare and Institutions Code section 602 petition finding he committed second degree robbery (Pen. Code, § 211) and assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4)). We conclude, among other things, that substantial evidence supports the judgment. We affirm.

FACTS

On April 7, 2017, E.H. went to meet some friends at a bar in Santa Monica, California. He consumed some beers and stayed until the bar closed in the early morning hours.

E.H. then went to a McDonald's restaurant to order food where he saw a group of young men with a girl named A.B. A.B. asked E.H. for "money for food." E.H. pulled out his wallet and gave her money. He heard A.B. say that "[he] had a lot of money."

E.H. left McDonald's and walked down the street to "take the bus." A.B. and the young men in the group followed him. E.H. heard people in the group say they "were going to grab" him. E.H. testified, "I got scared. I took off my belt to try to scare them, but they made a circle around me and they hit me." They "threw" him "to the ground" and began hitting and kicking him.

Gerardo M. was sitting down across the street. He saw the group "beating up" E.H. He went outside and yelled, "[H]ey, what are you guys doing?" The group "started running towards the Metro station." J.G., one member of the group, kicked E.H. and grabbed something "off the floor next to [E.H.]." It looked like a wallet. Gerardo M. heard people in the group yelling, "Hell, yeah, we got it. Let's run." Gerardo M. called the police. E.H. noticed that his wallet was missing.

Police Officer Maria Prado received a dispatch call about an assault. Other police officers had detained "possible suspects." K.E. and J.G. were two of the minors police detained at a train station. J.G. possessed E.H.'s wallet.

Prado drove E.H. to that area for "a field show-up." A total of seven people were individually brought before E.H. to be identified. E.H. identified K.E. as one of the minors "involved in

his attack." As to all seven, he told Prado that "they were all involved."

The juvenile court sustained the Welfare and Institutions Code section 602 petition, found K.E. committed robbery and assault, declared K.E. to be a ward of the court, and placed him on home probation.

DISCUSSION

Eyewitness Testimony

K.E. contends the eyewitness testimony was unreliable. He claims "the field show up was unduly suggestive," and consequently there was insufficient evidence to support the judgment. We disagree.

In reviewing a claim of insufficiency of the evidence, we "review the entire record in the light most favorable to the judgment." (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 521.) "We neither reweigh the evidence nor reevaluate the credibility of the witnesses." (*Ibid.*)

We look to the " 'totality of the circumstances' " to determine whether a particular identification was " 'unnecessarily suggestive.' " (*Foster v. California* (1969) 394 U.S. 440, 442.) "[I]n some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." (*Id.* at p. 442, fn. 2.) The trier of fact decides "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case . . . ." (*Ibid.*) "The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.)

Officer Prado testified E.H. agreed "to participate in a field show-up." She read E.H. the police department's standard admonishment regarding identifications. She said this advises witnesses that "although we are going to present possible suspects to them, it shouldn't influence their decision. And if the people presented to them are not the actual suspects involved in the crime, that they're allowed to say it's not, so we can continue our investigation to find the people involved with the crime." Prado testified E.H. understood her "admonishment."

"For an identification procedure to violate a defendant's due process rights, 'the state must, at the threshold, improperly suggest something to the witness . . . .' " (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.) Prado's admonishment did not suggest that the police had captured the actual perpetrators.

K.E. cites to conflicting testimony by E.H. He notes E.H. was asked, "On the night that this happened, when you made the identifications, did the police tell you that they had the people who did this in custody?" E.H.: "Yes." He was asked, "Did they read anything to you or say anything else to you before your identification, other than that they had caught the people and that those people had your things on them?" E.H.: "No."

K.E. claims this testimony shows Prado's testimony is not credible. But we do not decide the credibility of the witnesses and we do not weigh or resolve conflicts in the evidence. (*People v. Mohamed, supra*, 201 Cal.App.4th at p. 521.) Prado's testimony about giving an admonition for a field identification was confirmed by the testimony of Police Officer Tina Greer. The juvenile court could reasonably rely on Prado's and Greer's testimony and reject E.H.'s contrary testimony on this issue. (*Ibid.*; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051, fn. 14

["[W]e resolve all evidentiary conflicts in favor of the trial court's findings"].)

K.E. notes E.H. had been drinking before he made the identification. He claims the transcript of the field identification shows E.H. made conflicting statements. When asked by police if he could identify the person who took his wallet, E.H. responded, "I don't know. When they kicked my face, I don't remember anything." K.E. suggests this impeaches E.H.'s claim that all seven youths were involved. But the wallet was taken after E.H. had been assaulted. His inability to identify who took the wallet does not mean he could not identify those who initially attacked him. The trier of fact determines "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case . . . ." (*Foster v. California, supra*, 394 U.S. at p. 442, fn. 2.) It must "measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116; *In re Anthony T.* (1980) 112 Cal.App.3d 92, 97.) Here the trial court observed E.H. testify at trial. It weighed the evidence and resolved the credibility issues and the alleged evidentiary conflicts. (*People v. Brandon*, *supra*, 32 Cal.App.4th at p. 1051, fn. 14.)

Moreover, several factors support the reliability of E.H.'s identification. Prado testified that E.H. understood the admonishment. E.H. positively identified K.E. as one of the attackers. He had the opportunity to see the members of the group in the restaurant and on the street when they made a circle around him. They were close to him. His identification took place when his memory was fresh, shortly after the attack. (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114; *In re Carlos M., supra*, 220 Cal.App.3d at p. 387.) In addition, he identified K.E.

"instantaneously." (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072.)

E.H. did not know who took his wallet. But Gerardo M. was an eyewitness. He saw who took the wallet and his testimony confirmed that the group attacked E.H. Police arrived only a few minutes after the incident. They apprehended K.E. with the group that had attacked E.H. J.G. and K.E. were in the group police detained at a train station two blocks from the crime scene. In a search police found J.G. possessed E.H.'s wallet. A.B. was also in that group. E.H. identified her in the field show-up, and at trial, as the person who asked him for money and commented on how much money he had.

Prado said each "possible suspect" was approximately 10 feet away from the patrol car where E.H. was seated. They were brought forward "one at a time." She asked E.H. "*one by one*, if the people presented to him were the people in the crime." (Italics added.) K.E. suggests the field show-up video tape shows E.H. was too intoxicated to identify him. But that is not the case. That video supports the court's finding that E.H. made a valid and positive identification.

K.E. claims such field show-ups are flawed and "produce higher rates of misidentification than lineups." But such "single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended." (*In re Carlos M., supra.* 220 Cal.App.3d at p. 387, italics omitted.) "The potential unfairness in singling out a suspect is offset by the likelihood that a prompt

identification shortly after the commission of a crime *will be more accurate than a belated* identification days or weeks later." (*People v. Cowger, supra*, 202 Cal.App.3d at p. 1071, italics added.)

E.H. identified K.E. as one of the minors "involved in his attack." K.E. was one of seven individuals brought before E.H. for the field show-up. E.H. was unable to remember the faces of his attackers at trial. But " 'an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification' " in his or her trial testimony. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

E.H. could not identify which blow or kick each person in the group inflicted. But he told Prado that "they were all involved."

K.E. suggests the judgment must be reversed because E.H. could not describe what blows or kicks he (K.E.) inflicted when questioned by police.

But in group attack cases, the victim's inability to describe the specific blows does not immunize those who participated in a group attack from criminal liability. (*People v. Modiri* (2006) 39 Cal.4th 481, 493, 496-497.) "[W]here more than one person perpetrates an attack," "the evidence is often conflicting or unclear as to which assailant caused particular injuries in whole or part." (*Id.* at p. 496.) The law "does not require the defendant, as a direct participant in a group beating or assault, to inflict a particular injury, or to be the sole cause of great bodily harm, where no such showing or finding can be made." (*Id.* at p. 493.)

The juvenile court rejected the claim that the field show-up evidence should be excluded or discounted. It found K.E. "is

identified from the field identification." K.E. has not shown the court erred.

Substantial Evidence for the Robbery Finding

K.E. contends the finding that he committed robbery is not supported by substantial evidence. He claims there was insufficient evidence "the intent to steal was formed before the use of force or fear." We disagree.

"Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property." (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) "[T]he evidence must show that the requisite intent to steal arose either before or during the commission of the act of force." (*Ibid.*)

The juvenile court found K.E "was one of the ones that was involved in this incident." "They were all part of the beating." "This attack occurred because they were after the money."

The People contend the evidence shows K.E. was part of a group. They claim the juvenile court could reasonably infer this "group, in concerted effort, initiated the confrontation against E.H. to carry out a collective intent to forcibly dispossess E.H. of the money he had earlier revealed imprudently." We agree.

K.E. was part of a group of boys. E.H. testified a girl named A.B. was also part of the group. He said, "I think her buddies asked her to come to me to ask me" for "money in order to buy food." He gave her money after she asked for it. He heard A.B. say that "[he] had a lot of money." When he left the restaurant, the group followed him. E.H. said, "They started saying . . . they were going to grab me." "[They] made a circle around me and they hit me."

Gerardo M. testified he saw the group punch E.H. in the head and kick him. He saw J.G., a member of the group, take what appeared to be a wallet. He saw people in the group flee and heard them scream, "Hell, yeah, we got it. Let's run." The evidence shows a planned attack after the group discovered that E.H. possessed "a lot of money." K.E. was part of the group that followed E.H. out of the restaurant, threatened him, formed a circle around him before the physical assault, and then assaulted him.

Evidence of Aiding and Abetting

K.E. contends there is insufficient evidence that he "aided and abetted the commission of the assault or robbery." We disagree.

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "Aiding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 532.)

The juvenile court could reasonably infer the elements of aiding and abetting for assault and robbery were established. E.H. was assaulted and robbed by the group. He identified K.E. as one of the people in the group who had attacked him. A reasonable inference is that K.E. shared the group's intent to assault and rob E.H. by his direct participation in the assault. K.E. facilitated the assault and robbery by being part of the group's movements to follow E.H., form a circle around him, attack him and leave him vulnerable on the ground where his

wallet was taken. (*People v. Nguyen, supra*, 21 Cal.App.4th at p. 531 [one aids and abets by being "present at the commission of a crime for the purpose of assisting in its perpetration"].) The group's intent to take the wallet was shown by their screaming, "We got it. Let's run."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

J. Christopher Smith, Judge

Superior Court County of Los Angeles

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

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